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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 749

FRANCISCO ROMERO,

Petitioner,

—against—

GARCIA & DIAZ, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, GARCIA & DIAZ, INC., IN OPPOSITION

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Statement of the Case

This suit initially was instituted against:

Compania Trasatlantica; also known as Spanish Line, the owner of the vessel;

Garcia & Diaz, Inc., the shoreside agent of the owner, Compania;

International Terminal Operating Co., a stevedoring contractor; and

Quin Lumber Co., Inc., a carpentry contractor.

Note: References other than to the opinion of the Court of Appeals are to the appendix for appellant filed in the Court of Appeals.

This Court sustained the dismissal of the suit against Compania, the vessel owner, 358 U.S. 354. The action was subsequently discontinued against International, the stevedore. The carpentry contractor, Quin, paid petitioner $25,000.00 in settlement.

In addition

> "* * * The Spanish law provides Romero with a lifetime pension of 35% to 55% of his seaman's wages which may be increased by one-half if the negligence of the shipowner is established; it also allows the recovery of the Spanish counterpart of maintenance and cure. These rights under the Spanish law may be enforced through the Spanish consul in New York." (358 U.S. 354, at page 358)

Petitioner then continued the prosecution of the suit against respondent.

Result Reached by the Court of Appeals Represents a Proper Determination of the Issues Involved in This Litigation and Certiorari Should Be Denied

The Court of Appeals, first, clearly stated in its opinion, that its reversal of the District Court was based solely on its review of the District Court's "ultimate determination of negligence"—its "conclusion of law"—and not on a review of the "evidentiary facts leading to it" and "not on the facts on which it was based" (C. of A. Op. p. 17a).

In making more fully clear its action in this respect, the Court of Appeals stated:

> "* * * Recognizing the limitations placed upon the scope of review by F. R. Civ. Proc. 52, we are unable to sustain the trial judge's conclusions as to control and of negligence by G & D." (C. of A. Op. p. 5a)

But even if not permitted free review of the District Court's "ultimate determination of negligence," the Court of Appeals found itself nevertheless compelled

> "* * * to reverse here on the basis, stated in United States v. United States Gypsum Co., 333 U. S. 364, 395 (1948), that 'a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" (C. of A. Op. p. 18a)

And, the Court of Appeals did review the entire record. One complete copy of the District Court transcript was on file in the Court of Appeals. On the argument of the appeal, the Court of Appeals requested counsel for both parties here to deliver up to it their complete copies of the transcript. This was done. Each Court of Appeals Judge, accordingly, had before him, when considering the appeal, the entire record of evidence in the District Court.

No opinion whatever was written by the District Court. There, accordingly, was no discussion whatever by the District Court of the 1,462 pages of testimony and no comment whatever on, or appraisal of, this evidence, of the witnesses or of the agency con-

tract or the other exhibits. The District Court merely made 32 findings of fact, many of these multiple in number, and 6 conclusions of law.

As no opinion was written by the District Court, the Court of Appeals found it necessary to state the issues present in this case which it did as follows:

> "The theory of plaintiff's case was that G & D was in control of the loading, either alone or jointly with the owner. Negligence appears to have been predicated on three alternative grounds; first, that it was negligent not to have the boom lowered by longshoremen; second, that if the boom was not to be lowered by longshoremen, it was negligent not to have it lowered by the carpenters; and, third, that, in any event, it was negligent to permit the boom to be lowered as it was in view of the disarray alleged to have been created by the carpenters, their claimed presence on the scene, and the intervention of the volunteer." (C. of A. Op. p. 5a)

To properly understand the result reached by the Court of Appeals respecting these issues, it is most necessary that a complete statement of the events leading up to the accident, the facts of the accident and the cause of the accident be made. Such a statement is not made in the Petition or in Petitioner's Brief and, accordingly, one is made here.

Petitioner was a crew member of the SS "Guadalupe", owned by Compania Trasatlantica, and in service between ports in Spain, United States, Cuba and Mexico.

"* * * It had booked a shipment of grain for an

eastbound trip; while the Guadalupe was in New York harbor on her westbound voyage to Cuba, Suarez, a responsible employee of G & D, had a representative of the Board of Underwriters come to the ship and discuss the stowage of the grain with the mate, who gave orders as to what shifting boards, feeders, etc., he wished constructed for stowage on the ship's return to New York. G & D arranged for Quin to do this work. Learning that the Guadalupe would arrive early on May 12, 1954, at an International Terminal Co. pier in Hoboken, Suarez instructed Quin to have its carpenters ready that morning and International to have longshoremen available at 1 P. M. by which time it was thought the carpentry would be completed and the vessel ready to load." (C. of A. Op. pp. 3a-4a)

The first testimony taken in the action was the deposition of Petitioner. This deposition was taken on July 20, 1954, a little over two months after the accident (Ex. M, 202a). Petitioner testified then that when the vessel was coming up New York Bay on its return to New York to pick up the grain, and prior to its arrival at Pier 1, Hoboken, all the booms on the vessel were raised out of their deck cradles and that he assisted in that work on the forward deck and on the "Castle" with three other crew members, Sampedro, Pena and Caanano (205a-206a); that in assisting in raising the booms before arrival of the vessel at the pier he had attended the wire or cable on the niggerhead, had so assisted many times previously and was fully familiar with this work (205a, 207a); that after arrival of the vessel at the pier all the booms on the forward main deck were again changed—lowered—and

that again he, Sampedro, Pena and Caamano did this work (207a-209a); that they then went up on the "Castle" to lower the boom for No. 2 hatch located up there (210a-211a); that he, Pena and Caamano went up on the castle and Sampedro stayed down on the main deck to hold the cargo fall from this boom to prevent it from swinging (212a-213a); that he put the cable or wire on the niggerhead, Caamano ran the winch and Pena attended the shackle (213a); that he put the turns of the cable or wire around the niggerhead (213a); that Caamano, the winchman, then raised the boom slightly with the winch in order to release the tension on the topping lift chain which held the boom aloft and Pena then unshackled the topping lift chain from the deck padeye (213a); that Caamano then proceeded to lower the boom with the winch and while the boom was then being lowered it fell and the accident happened (213a-214a).

Petitioner testified on this deposition taken slightly over two months after the accident that the accident occurred *solely* and *only* because the cable or wire he had put on the niggerhead had kinks or knots or twists in it; that one of these kinks, knots or twists, which he referred to as a "Codillo", (81a, 214a) came to his hands as the boom was being lowered and as he was feeding the cable onto the niggerhead (214a); that it went through his hands and onto the niggerhead and caused the wire or cable to come off the niggerhead and the boom to fall (214a); that when this boom had been raised coming up the bay and before the vessel arrived at the pier he had similarly used this same wire or cable and had left it coiled near the winch (215a); that this kink, knot, twist or "Codillo" was even then in the cable and had been in the cable a long

time (219a-220a); that when they went up on the castle after arriving at the pier in order to lower No. 2 boom he found the cable thrown in a heap (215a); that he remonstrated in Spanish to the shore workers because of this (214a-215a); that he, nevertheless, put the cable or wire on the niggerhead after "I only tried to clear up the first few twists" (216a); that a shore worker helped him clear up the balance of the cable (217a):

> "Q. * * * And when I put the first few turns over the drum of the winch, he helped me to clear up the balance, the rest of the cable.
>
> * * * *
>
> Q. And was he helping him straighten out the cable at the time of the accident? A. Yes.
>
> * * * *
>
> Q. Did any other laborer help straighten the cable at any time? A. No, because it wasn't necessary. The cable was all wound up." (217a)

Petitioner's testimony on the trial as to how the accident occurred was the same (73a-74a).

Petitioner's further deposition was taken on August, 3rd, 1955 (Ex. "N", 218a). He testified as to the twist, kink, knot or "Codillo" or whatever it might be called, that caused the accident, as follows:

> "The Witness: *The codillo that caused the accident was the one that the cable already had.* (Italics ours)
>
> Q. How long did it have that codillo? A. I don't know how long." (219a)
>
> * * * *

"Q. How soon does a cable acquire codillos after it is put aboard a ship. A. It can get them the very first day or even on the first job that is done.

"Q. Isn't it the work of the seamen to remove those and straighten them out? A. Some of the codillos, *yes, but there are others that you can't remove. They remain there and they stick to the cable.*" (220a) (Italics ours)

* * * *

"Q. You say in your affidavit this wire cable should have been changed before the accident for a new one. How long prior to the accident do you say it should have been changed? A. It should have been changed before but I don't know how long before." (220a)

"Q. Why should it have been changed before the accident? A. Because it was bad. *It had been in work for a long time and it had many of these codillos. I don't know how many. Many.*" (220a) (Italics ours)

* * * *

"Q. Did the men from shore cause the codillo to get in the cable, that is, the codillo that caused your accident? A. *I said before that the one that caused the accident was there before.* The others were brought about by the men on the ground." (220a) (Italics ours)

And as to other defects in the cable or wire that might have contributed to the accident, plaintiff testified:

"Q. Were there any other defective conditions in the cable other than codillos? A. *As the result*

of a long period of work, there were codillos and there was grease, which naturally represents defects. (Italics ours)

Q. Were there any defects other than codillos in the cable? A. Yes, in addition to the codillos there was grease and oxide, which means rust really, and of course it had been used for a long time in work.

* * * *

Q. What do you mean by that? A. I want to say that the cable was old and had codillos, also rust and grease.

* * * *

Q. Had you experienced any difficulty working with the cable the morning of the accident when the booms were first raised? A. All the difficulties that there are is the codillos that the cable had and the cable was defective. There is nothing that I have to experience.

* * * *

Q. When you were using the cable at the time you were injured, was it hazardous to use? A. It was hazardous but I didn't know it was going to be so.

Q. Why was it hazardous? A. Because it wasn't in proper condition for work.

Q. Why wasn't it in proper condition for work? A. Do you want me to say it again? Because the cable has the defect of having these codillos, grease and rust.

Q. Why didn't you know it was hazardous for use? A. *I had been working with the cable as it was for quite some time. Nothing had happened but it was dangerous, it was hazardous.*" (221a-222a) (Italics ours)

And as to the reason why plaintiff did not take more care or time with the work of lowering this boom, he testified:

"Q. Did he attempt to straighten out the cable before he put in on the drum? A. I tried to but there was no time. I had no time. We were in a hurry. The meal time was due, it was after 10. We were in a hurry. I only tried to clear up the first few twists and then the other men came in to help me untwist it."

This "hurry" by the crew to get the boom lowered so that they could go "to eat" was confirmed by the seaman Cammano:

"By Mr. Klonsky:

Q. Mr. Cammano, was there lumber down the dock to be brought on the ship? A. How do I know? All I am told is to lower the boom so I can get out and go to eat." (106a)

But even if plaintiff had not been in a hurry to go out to eat, and had he taken an unlimited amount of time with the cable and in lowering the boom the "Codillo" would still have been in the cable and have come to his hand and gone onto the niggerhead or drum of the winch.

"Q. Was it your duty to remove any knots that were in the cable at the time? A. *There is no way of removing those knots.* A cable has to be drawn. (Italics ours)

Mr. Puente: Not drawn.

The Interpreter: It has to be removed or changed.

Mr. Axtell: Does he mean renewed?
The Interpreter: Yes. It means to replace."
(Ex. "N"; Pl's dep. of August 3, 1955, pp. 21-22)

The cause of the accident as thus testified to by the petitioner is clear and as stated it is undisputed. At no time did plaintiff, on trial, or in his depositions, testify to any other cause, contributory or otherwise, to the accident.

The single, sole and only cause of this accident was this permanent "Codillo" in the cable. This "Codillo" had been in the wire or cable for a long time prior to the accident. Its presence in the cable did not result from the wire or cable being thrown aside in a heap by the shore workers, and it could not have been removed from the cable by plaintiff or the shore-worker as the cable was straightened out. The permanent "Codillo" in the cable or wire, together with the fact that the wire or cable was "old", "greasy" and "rusty" made the cable dangerous and hazardous to work with. Plaintiff was aware of all these conditions prior to the accident and of the hazard and danger involved in using it. He had used the cable in this condition many times prior to the accident and as late as the early morning of the accident when the vessel was coming up the bay and this boom was raised out of its cradle on deck.

The District Court completely ignored this undisputed testimony of the plaintiff as to the cause of the accident in its findings. On these facts as testified to by the plaintiff no possible fault could be present on the part of the respondent, Garcia & Diaz, the mere shore side agent of the vessel owner.

The cable was a part of the vessel's permanent equipment. It had been supplied and put aboard by the vessel owner, Compania, not by the respondent, Garcia & Diaz. Its presence aboard in the "dangerous and hazardous" condition it was in when the accident occurred was unknown to respondent, Garcia & Diaz. By no stretch of imagination could it be even suggested that respondent, Garcia & Diaz had any responsibility with respect to its condition or to its use by plaintiff.

The Court of Appeals properly concluded on this undisputed testimony of petitioner that:

> "The difficulty which plaintiff cannot surmount is that while the evidence would thus suffice to establish negligence, as well as unseaworthiness, if the action were against an owner, it does not cast G & D as liable without further proof. The additional proof needed was that G & D, knowing or having a duty to know of the dangerous condition created by the carpenters' disarray of a cable with kinks or by the kinks themselves, directed or permitted the lowering of the boom by an inadequate complement of crew. The evidence established none of this. There was no evidence that Suarez knew of the kinking in the cable or the disarray alleged to have been created by the carpenters at No. 2 hatch. Neither was there any basis for charging G & D with such knowledge; as husbanding agent, G & D had no responsibility for the ship's gear and its duty was to arrange for the presence of the carpenters, not to supervise what they did. Whether the judge was justified in finding that Suarez heard the boatswain report the carpenter foreman's request to the mate is disputed; we shall assume in plaintiff's favor that he

was, since Suarez was in a position to hear the report and the judge was not bound to credit his denial even in the absence of contradiction. However this is not enough. Even if the conversation apprised Suarez that the boom was to be lowered by the crew, it was not negligent for Suarez to permit this, and nothing gave him any indication that a larger than normal gang might be required or that the boatswain would not provide one if it were. Determination of all this was the responsibility of the representatives of the crew's employer, namely, the ship's officers, not of Suarez; there was no reason for him to assume the boatswain would not recruit a complement 'sufficient in number and skill' under whatever conditions the boatswain found to prevail when he arrived at No. 2 hatch. We need not speculate whether the mate would have honored a suggestion on Suarez' part; it was not Suarez' duty to make one." (C. of A. Op. pp. 16a-17a)

It is submitted that on the basis of the undisputed testimony of petitioner, alone, the District Court clearly and erroneously determined petitioner's injuries were caused by respondent's negligence and that the Circuit Court properly was convinced that "a mistake has been committed" by the District Court.

Respondent Was Not in Control of the Vessel, or of Its Crew, the Loading or the Carpenters

Petitioner stresses, that by reason of the agency agreement respondent was in control of the vessel, its crew, its loading and the carpenters. The Circuit Court properly concluded after reviewing all the tes-

timony of respondent's functions under the agreement (C. of A. Op. pp. 6a-8a) that:

> "The degree of control exercised by G & D must be determined not simply from the language of the agreement but from operation under it. Much evidence was taken on this." (C. of A. Op. p. 7a)
> * * *
> "* * * Clearly G & D was not in control of the vessel during the long periods when Suarez was absent; there would hardly be a shift to joint control whenever he came on board." (C. of A. Op. p. 8a)

And the Court of Appeals also properly concluded in this respect that the relationship of respondent to the vessel differed *toto coelo* from that of the defendant in *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190 (2nd Cir.), cert. denied 314 U.S. 682 (C. of A. Op. p. 8a) and, accordingly, that:

> "* * * G & D did not have an affirmative duty to see to it that plaintiff was provided with a safe place and with safe methods to work." (C. of A. Op. p. 9a)

Additional to the functions of Suarez, as outlined in the Court of Appeals opinion, and fully supporting its conclusions that respondent was not in control of the vessel, its crew, the loading or the carpenters, is the uncontradicted testimony by Suarez that "I never give orders to anyone on the ship." (157a); the testimony by the Mate that "He [Suarez] would have nothing to do with the orders on board (121a-122a); and the testimony by the boatswain that the job of Suarez was "to come and discuss with the first mate the cargo" and "that is all he does" (97a-98a).

It was clearly erroneous, in the light of all this, for the District Court to determine that respondent was, through Suarez, the only employee it had at the vessel, in control of the vessel, its crew, the loading and the carpenters. The Circuit Court could not avoid being "constrained" to be "left with the definite and firm conviction that a mistake has been committed" by the District Court on this issue of control.

A decision directly in point here is *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783, where this Court, in enumerating the duties of the defendant agent stated:

> "* * * Under the General Agency Agreement the general agent is appointed by the United States 'as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it.' Art. I. The general agent agrees 'to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe.' Art. 2. The general agent engages itself to 'maintain the vessels in such trade or service as the United States may direct,' to 'collect all moneys due the United States' under the agreement to 'equip, victual, supply and maintain the vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe,' Art. 3A, to 'arrange for the repair of the vessels' and to 'exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels.'" (pp. 795, 796)

And despite the duty of the agent Cosmopolitan, to "equip, victual, supply and maintain the vessels" to "arrange for the repair of the vessels", to "exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels", it was determined by this Court that Cosmopolitan was not in control of the vessels, and this Court concluded that:

> "* * * the United States had retained for the entire voyage the possession, management, and navigation of the vessel and control of the ship's officers and crew to the exclusion of the general agent," (p. 795)

In any event, the issue of management, operation and control of the vessel by respondent on the day of the accident have been tried, litigated and decided in the previous proceedings had in this suit.

The first trial was held before Judge Sugarman in June, 1956. In the record of that trial, filed in this Court on the previous appeal herein, the following appears at page 86a:

> "The Court: I brought Mr. Suarez here at your request.
>
> Mr. Puente: That is right.
>
> The Court: Now am I to understand that his testimony as now on the record, coupled with the deposition of William Martinez, or technically, it is the deposition of Garcia & Diaz, Inc., through William Martinez, constitutes all the proof that you propose to offer on the question of management, operation and control of the 'Guadalupe' on May 12, 1954 by Garcia & Diaz? I want an answer, not a shaking of your head.

Mr. Puente: I am sorry, your Honor. Yes I have two lawyers here.

Mr. Axtell: There is nothing more to offer."

And on appeal after the first trial this Court concluded as to these issues (358 U.S. 354, at pages 384-385):

"* * * At the pre-trial hearing the District Court concluded that Garcia & Diaz was not Romero's employer and did not operate and control the vessel at the time of the injury. These issues were properly adjudicated, and thus the claims for unseaworthiness and maintenance and cure were properly dismissed. However, the District Court did not consider whether petitioner was asserting a claim based upon the negligence of Garcia & Diaz; *a claim independent of* the employment relationship or *operation* and *control*." (Italics ours)

And this Court in remanding the action to the District Court did so for "further proceedings not inconsistent with" its determination of the issues of operation and control:

"The judgment of the Court of Appeals is vacated and the cause remanded to the District Court for further proceedings not inconsistent with this opinion." (P. 385)

This Court thus concluded that respondent "did not operate and control the vessel at the time of the injury" and that "These issues were properly adjudicated * * *".

And this Court remanded this suit to the District

Court for the limited purpose of determining whether petitioner was

> "* * * asserting a claim based upon the negligence of Garcia & Diaz, a claim independent of the employment relationship or operation and control".

That the District Court was precluded from further consideration of these issues under these circumstances is settled beyond any question. Authority on this point is the decision of *In re Sanford Fork and Tool Company*, 160 U. S. 247 (1895), where this Court stated:

> "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. Sibbald v. United States, 12 Pet. 488, 492; Texas & Pacific Railway v. Anderson, 149 U. S. 237." (P. 255)
>
> * * *
>
> "It must be remembered, however, that no question, once considered and decided by this court, can be reexamined at any subsequent stage of the same case. Clark v. Keith, 106 U. S. 464; Sibbald v. United States, and Texas & Pacific

> Railway v. Anderson, cited at the beginning of this opinion." (P. 259)

It is submitted that, aside from the fact that the record clearly evidences that respondent neither directly nor through Suarez exercised any control over the "Guadalupe", or of its crew, the loading, or of the carpenters, the District Court was conclusively precluded from inquiring into any possible issues of management, operation or control. These issues had been decided and determined in the previous proceedings in this litigation and could not be inquired into further by the District Court.

Further brief comment only is necessary to demonstrate the misstatements in petitioner's brief and it is made in the following.

I

There was no evidence in the record that safety required longshoremen be brought aboard to lower the boom. The determination by the District Court that safety required the hiring of longshoremen to lower the boom was totally unsupported by any evidence in the record. The Court of Appeals in stating

> "Turning from the finding to the evidence, we think there was none to prove that safety required the hiring of longshoremen in order to lower a single boom to raise lumber for the carpenters." (C. of A. Op. p. 11a)

accordingly, was not reviewing evidentiary facts as there were none in the record supporting the District Court's determination to be reviewed.

Similarly, the Court of Appeals found

> "* * * Nothing in the entire record established that it was dangerous for the crew of a vessel, and particularly for the crew of the Guadalupe, to handle their own booms." (C. of A. Op. p. 11a)

II

Respondent's representative, Suarez, did not time the arrival of either the carpenters or the longshoremen.

His undisputed testimony respecting the arrival of the carpenters, given under cross-examination by petitioner's counsel is:

> "Q. Let me put it to you this way: By reason of your conversations with Garcia & Diaz some time before the ship moored, at what time was it, to the best of your knowledge, that the carpenters were expected to be aboard the ship? A. As soon as she arrived, I imagine. I don't know. He has the job to do. He has to have it ready that day. If he can come in at one o'clock and do it by 5 o'clock it is all right. The grain was ordered for 6 o'clock that night." (164a-165a)
>
> * * *
>
> "Q. But you were the one who called the carpentry concern to come on the ship that morning, weren't you? A. To tell them the ship was arriving that morning.
>
> Q. And you told them to come on? A. No. They have orders to build up the erection of fittings in a certain manner which is agreed upon already. I don't tell them what to do." (164a)

It is undisputed, as stated by the Court of Appeals, that the arrangements for the loading of the fittings for grain had been arranged between the mate of the vessel and a representative of the Board of Underwriters' on the vessel's westbound voyage to Cuba (C. of A. Op. p. 3a) and not by Suarez.

As to the arrival of stevedores, Suarez's uncontradicted testimony given under cross-examination by petitioner's counsel, is:

> "Q. You were nodding your head affirmatively up until now. A. The mate must have sent a cable to hire two gangs for cargo for one o'clock due to his arrival being at 8:20,—40, or—50, or it might have been 9 o'clock.
>
> Q. So you deny that your spoke to the ITO people? A. No, I must have spoken to them that morning, but prior to that the mate must have given me instructions to hire two gangs for one o'clock by cable." (160a)

And the mate of the vessel, also under cross-examination by petitioner's counsel, testified:

> "Q. And you knew, did you not, at the time of the accident, that the stevedores were not to come on until that afternoon? A. There were no cargo operations, so there would have been no need for the stevedores. *They were not to be on board.* (Italics ours)
>
> Q. But wasn't there an operation required to bring the lumber from the dock onto the ship? A. Yes, there was an operation to bring lumber on board, but I must point out that this work is done by members of the crew. They would

be the ones to handle any such material that is not cargo. For instance, provisions, lumber, paint." (119a)

III

Suarez did not know that carpenters were in the forward part of the vessel and he did not know petitioner and other crew members had gone forward to lower the boom.

Suarez had come aboard the vessel when the gangway was put out. Selvaggio, supervisor of the carpenters, came aboard about twenty minutes later (120a). Campos, the mate, and Suarez were then standing on the stern of the vessel in the vicinity of No. 5 hatch. The gangway to shore had been put out there (115a). The exact location where they were standing was identified by Campos by the placing of his name on the photograph, Exhibit "C" (115a). The swimming pool or tank is located over No. 5 hatch (89a). Sampedro, the bos'n, and other crew members, were working dismantling it (89a). Selvaggio when he came aboard went directly to Sampedro, the bos'n, (98a) and asked Sampedro to lower the booms for No. 5 and No. 2 hatch (89a). When Selvaggio spoke to the bos'n they were approximately 40 feet distant from Suarez, and the mate, Campos (99a). Sampedro, then spoke to the mate, Campos, advising him that he was going forward to lower No. 2 boom (99a). The mate told the bos'n "Okay, go ahead and do it" (116a).

Suarez did not know that Selvaggio had asked the bos'n to lower No. 2 boom and he did not know that the bos'n had advised the mate that he was going forward to lower that boom. He testified:

> "Q. Now, there was a time, was there not, when you were in the company of the chief mate, and Sampedro, the boatswain, came over to talk to the chief mate? A. There might have been, yes.
>
> * * * *
>
> Q. And you do not now recall what it was the boatswain had told the chief mate or the chief mate had told the boatswain? A. I wasn't listening to what they were saying." (163a)

And the Mate, Campos, testified:

> "Q. At that time did Louis Suarez speak to the boatswain? A. No." (116a)

Suarez did not and could not know if the carpenters were at the forward hatches, had removed hatch covers or tarpaulins or were ready to work there. There is no proof whatever in the record that he did know these things. On the contrary, Suarez testified with respect to the time prior to the accident:

> "Q. Were you on the forward part of that ship that morning at any time? A. No, sir." (152a)

IV

Respondent did not have a "contingent financial interest" in the saving of labor costs. Respondent receives, as agent, commission on passengers and freights booked for ships of Compania (195a). It receives no other compensation for its services as agent and has no interest, contingent or otherwise, in labor costs or the saving thereof. Martinez, Treasurer of Garcia & Diaz, confirmed this in his testimony.

> "Q. You told us that Garcia & Diaz, Inc. receives a commission from Compania Transatlantica, and that is the only financial benefit that Garcia & Diaz, Inc. as a corporation receives from Compania Transatlantica? A. That is correct" (187a-188a).

V

Suarez was not coordinator between the vessel and shoreside personnel. The uncontradicted testimony, brought out by the Court and by petitioner's counsel on cross-examination, is to the contrary.

> "By the Court:
>
> Q. What were you in 1954? A. Just merely a coordinator between the office and the ship.
>
> * * * *
>
> Q. So that you were, in effect, a kind of liaison between the office of Garcia & Diaz and an arriving ship? A. That's correct.

By Mr. Klonsky:

Q. And also, were you a sort of liaison between the ship and the shore workers who came on the ship? A. Not the shore workers, no. I had nothing to do with the shore workers. Only the superintendent of the pier would be the one that I would talk to.

Q. You would also talk to the head of the carpenters? A. No. What for?" (166a)

"Q. Haven't they on many occasions, the foreman of the gangs that come from shore, talked to you about various things on the ship, what they would want, or what they would like, or what they have in mind? A. No. They have the hatch boss and the hatch bosses go to the superintendent." (167a)

VI

Petitioner did not contend on trial that the lowering of the boom should have been done by longshoremen. Petitioner's counsel moved at the opening of trial to amend his pleadings to state that the lowering of the boom should have been done by the carpenters.

"Mr. Klonsky:

* * * We now contend, and we think it is proper and we should prove it in line with what is inherent in the pleadings, as well as the liberal practice of amendment, if necessary, that if there are only carpenters aboard who are taking over a hatch and have work to do at the hatch, they are still independent contractors, they still have to do their own rigging.

* * * *

The Court:

Now he doesn't want to identify the stevedore, he wants to identify the carpenter as the party that should have been used. The defendant is objecting. In view of the fact that this case has been pending for so long, and in view of the fact that we had a pre-trial conference after this prolonged background and history of the case, I think it is an imposition on the defendant and on the Court to now want to say you didn't mean that the stevedore was the one, what you meant was that the carpenter was the one who should have done it.

Mr. Klonsky: We took the longshoreman out specifically on Thursday because——

* * * *

The Court: You told me on Thursday you propose to put in expert testimony which would indicate that the work should not have been done by the crew but should have been done by the carpenter.

* * * *

Mr. Klonsky: May we assume that the complaint is amended in the respects wherever the words 'stevedore employees' appear, that it also refers to any independent contractor aboard the vessel, who would be, particularly, carpenters in this case, would be the ones to rig the booms in place and instead of the plaintiff and fellow crew members?

The Court: Yes, it will be deemed to be so amended.

Mr. Klonsky: Limited to the carpenters." (59a-60a)

Conclusion

The Court of Appeals made amply clear in its opinion, first, that its reversal of the District Court was based solely on its review of the District Court's "ultimate determination of negligence"—its "conclusion of law"—and not on a review of the "evidentiary facts leading to it" and "not on the facts on which it was based."

This Court of Appeals did here exactly as it did in *Verbeeck* v. *Black Diamond Steamship Corp.*, 269 F. 2d 68 (1959). In that case this Circuit Court stated as it did in the present case:

> "* * * As we have steadily held, negligence is a conclusion of law which we review. See, e.g., Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, 2 Cir., 159 F. 2d 661; certiorari denied 331 U. S. 836, 67 S. Ct. 1519, 91 L. Ed. 1849; Johnson v. United States, 2 Cir., 168 F. 2d 886; Bonnewell v. United States, 4 Cir., 170 F. 2d 411, 412; Dale v. Rosenfeld, 2 Cir., 229 F. 2d 855, 858; Holmes, The Common Law 124-129 (1881)." P. 70

This Court denied certiorari in the *Verbeeck* case, 361 U. S. 934.

In the present case the Circuit Court did—and it clearly pointed out that it did in its opinion—confine itself within the limitations placed upon the scope of review by F. R. Civ. Proc. 52. That Rule provides only:

> "Findings of fact shall not be set aside unless clearly erroneous * * *."

However, the Circuit Court here has not set aside findings of fact. It has accepted the facts and reversed only on its review of the "ultimate determination of negligence", the "conclusion of law".

But even if the Court of Appeals was not free to do this, its reversal is soundly founded on its determination, made after a review of the entire record, that it was left with "the definite and firm conviction that a mistake has been committed".

It is submitted that in these circumstances the granting of certiorari is not warranted.

Respectfully submitted,

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